

EXHIBIT E

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CINEBASE SOFTWARE, INC., a California
corporation,

Plaintiff,

v.

MEDIA GUARANTY TRUST, INC., a
Delaware corporation; ALLEN L. BROWN, JR.,
an individual; NATALIA X. KROL, an
individual; JOSEPH ROZENFELD, an
individual; THOMAS WILLS, an individual;
CARL REISINGER, an individual; and
KATHERINE TOPPER, an individual,

Defendants.

Case No. C-98-1100 FMS

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR
MOTION TO DISMISS AND TO STRIKE PLAINTIFF'S
FIRST AMENDED COMPLAINT

Date: August 26, 1998

Time: 4:00 p.m.

Courtroom: 6

The Honorable Fern M. Smith

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. CINEBASE’S AMENDED COMPLAINT DOES NOT COMPLY WITH THE FEDERAL RULES OF CIVIL PROCEDURE	1
A. Cinebase Fails To Adequately Plead Copyright Infringement	1
1. Cinebase Does Not Properly Identify The Copyrighted Works That Are Allegedly Infringed By Defendants	2
2. Cinebase Does Not Allege Sufficient Acts Of Copyright Infringement	3
3. Form 17 Of The Federal Rules Supports A Dismissal Of Cinebase’s Copyright Infringement Claim	4
B. Cinebase’s Reverse Passing Off Claim Should Be Dismissed	5
C. Katherine Topper Should Be Dismissed From This Lawsuit For Lack Of Subject Matter Jurisdiction	6
1. Cinebase Does Not State A Claim Against Ms. Topper For Copyright Infringement	6
2. Cinebase Does Not State A Claim Against Ms. Topper For Reverse Passing Off	8
D. Cinebase’s Breach Of Confidence Cause Of Action Should Be Dismissed.....	8
E. Cinebase’s Breach Of Implied Contract Claim Should Be Dismissed	10
F. Cinebase’s Trade Secret Misappropriation Claim Should Be Dismissed.....	11
G. Cinebase’s Intentional Interference Claim Should Be Dismissed With Prejudice.....	11
H. Cinebase Does Not Properly Plead Fraud.....	12
III. THE COURT SHOULD DECLINE SUPPLEMENTAL JURISDICTION AND DISMISS MS. TOPPER AND THIS ACTION IN ITS ENTIRETY	13
IV. CONCLUSION	14

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Aliotti v. Dakin & Co.</u> , 831 F.2d 898 (9th Cir. 1987)	10
<u>Carnegie Mellon University v. Cohill</u> , 484 U.S. 343 (1988)	13
<u>Conkle v. Jeong</u> , 73 F.3d 909 (9th Cir. 1995)	12
<u>Gee v. CBS, Inc.</u> , 471 F. Supp. 600 (E.D. Pa.), affd, 612 F.2d 572 (3d Cir. 1979)	2, 4
<u>Grid System Corp. v. Texas Instruments Inc.</u> , 771 F. Supp. 1033 (N.D. Cal. 1991)	9
<u>Kelly v. L.L. Cool J.</u> , 145 F.R.D. 32 (S.D.N.Y. 1992)	2, 3
<u>QTL Corp. v. Kaplan</u> , 46 U.S.P.Q. 2d 1794 (N.D. Cal. 1998)	4
<u>Religious Technology Center v. Netcom On-Line Committee Svcs, Inc.</u> , 907 F. Supp. 1361 (N.D. Cal. 1995)	7
<u>Smith v. Montoro</u> , 648 F.2d 602 (9th Cir. 1981)	6
<u>Summit Machine Tool Manufacturing v. Victor CNC Systems</u> , 7 F.3d 1434 (9th Cir. 1993)	6
<u>United Mine Workers v. Gibbs</u> , 383 U.S. 715 (1966)	13
<u>Zeigan v. Blue Cross & Blue Shield of Greater N.Y.</u> , 607 F. Supp. 1434 (S.D.N.Y. 1985)	10

STATE CASES

<u>Diodes, Inc. v. Franzen</u> , 260 Cal. App. 2d 244 (1968)	11
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FEDERAL STATUTES

Fed. R. Civ. P. 9(b)	2, 12
Fed. R. Civ. P. 8	1

STATE STATUTES

Cal. Civ. Code § 1710.3	12
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1 **I. INTRODUCTION**

2 Rather than rebut the deficiencies that Defendants identified in Cinebase's first
3 amended complaint, Cinebase invites the Court to disregard the pleading requirements of the
4 Federal Rules of Civil Procedure. Put simply, Cinebase asks the Court to ignore Rule 8, Rule
5 9(b), and the approved pleading forms based upon Cinebase's conclusion that Defendants
6 committed unspecified tortious acts. From this conclusion, Cinebase argues that Defendants
7 must be aware of the tortious acts, thereby excusing Cinebase from pleading what those tortious
8 acts are. See Plaintiff's Opp. Mem. at 1 and 15 n.8.

9 Cinebase, of course, provides no authority for this proposition. Nor can it. The
10 Federal Rules of Civil Procedure require that a party seeking relief in federal court provide the
11 defendant with notice of the claims being made. The sufficiency of the notice depends upon the
12 claim being asserted. Here, Cinebase has failed to rebut Defendants' showing that Cinebase's
13 first amended complaint does not plead at least one essential element of its two federal claims
14 (for copyright infringement and reverse passing off) and four of its purported state law claims
15 (for idea misappropriation, breach of implied contract, trade secret misappropriation, and
16 intentional interference with economic advantage). Moreover, Cinebase's allegations of fraud
17 are deficient as a matter of law, because they fail to state the time, place, or recipient of the
18 alleged misrepresentations.

19 Because Cinebase already has amended its complaint once in response to
20 Defendants' motion to dismiss, Defendants request that the Court dismiss Cinebase's claims
21 with prejudice. Once dismissed, Cinebase requests that the Court decline to exercise
22 supplemental jurisdiction over any remaining state law claims.

23 **II. CINEBASE'S AMENDED COMPLAINT DOES NOT COMPLY WITH THE**
24 **FEDERAL RULES OF CIVIL PROCEDURE**

25 **A. Cinebase Fails To Adequately Plead Copyright Infringement**

26 As set forth in Defendants' Motion, Cinebase's claim for copyright infringement
27
28

1 fails to comply with Rule 8¹ because Cinebase does not allege essential elements with the
 2 specificity that Rule 8 requires. See Gee v. CBS, Inc. 471 F. Supp. 600, 643 (E.D. Pa.), aff'd,
 3 612 F.2d 572 (3d Cir. 1979); Kelly v. L.L. Cool J., 145 F.R.D. 32, 36 (S.D.N.Y. 1992).
 4 Specifically, Cinebase fails to (1) identify the specific copyrighted works that are allegedly
 5 infringed by Defendants, or (2) allege any specific acts by which Defendants have allegedly
 6 infringed those copyrighted works. Without these allegations, Cinebase's claim is fatally
 7 deficient.

8 **1. Cinebase Does Not Properly Identify The Copyrighted Works That**
 9 **Are Allegedly Infringed By Defendants**

10 It is undisputed that Cinebase can only claim copyright infringement for works
 11 that are registered. See Kelly, 145 F.R.D. at 37 n.6 ("Copyright registration is a jurisdictional
 12 prerequisite to an infringement suit."). Despite this limitation imposed on its claims, Cinebase
 13 persists in advancing the insupportable position that it has copyrights in works plainly beyond
 14 the scope of its copyright registration.

15 Cinebase attaches as exhibits to its amended complaint Certificate of
 16 Registration numbers TXu 819-557 and TXu 819-558. These certificates are clear on their face
 17 that the only works for which Cinebase has registered copyrights are (1) the "header file source
 18 code of Cinebase 2.0 computer program for management of high-resolution digital media" and
 19 (2) the "program source code of Cinebase 2.0 computer program for management of high-
 20 resolution digital media." See First Am. Cmplt., Exhs. 1 and 2. As a result, Cinebase at most
 21 can attempt to allege copyright infringement of the registrations for the "program source code"
 22 and "header file source code" for Cinebase 2.0.

23 Disregarding these legal requirements, Cinebase's amended complaint continues
 24 to allege copyright infringement of material on which there is no copyright registration,

25 ¹ Cinebase falsely contends that Defendants' Motion asks the Court to apply the pleading
 26 standards of Fed. R. Civ. P. 9(b) to its copyright claim. See Opp. Mem. at 9. Defendants make
 27 no such argument. In fact, Defendants' Motion clearly explains that Gee and its progeny require
 28 a greater degree of specificity when pleading copyright infringement under Rule 8. See
Memorandum at 5-6. Cinebase's reliance on Mid America Title Co. v. Kirk 991 F.2d 417 (7th
 Cir. 1997) to support this argument is misplaced. That case addressed the sufficiency of
 pleading that a compilation work was allegedly infringed. Id. at 421-22. There is no allegation
 concerning any allegedly infringed compilations in this case. Id.

1 including “the software architecture, . . . related design documents and object codes” for
 2 Cinebase 2.0 software. See First Am. Cmplt. ¶52.² Cinebase does so even though it does not
 3 and cannot plead that it has obtained a copyright registration for the architecture, related design
 4 documents, or object codes for the Cinebase 2.0 software. For this reason, the Court should
 5 dismiss with prejudice Cinebase’s copyright infringement allegations that are based on
 6 unregistered works. Kelly, 145 F.R.D. at 37.

7 2. Cinebase Does Not Allege Sufficient Acts Of Copyright Infringement

8 In its amended complaint, Cinebase fails to identify any specific product that any
 9 of the Defendants makes or sells which infringes Cinebase’s registered copyrights. Instead,
 10 Cinebase alleges in wholly conclusory fashion that it is “informed and believes . . . that
 11 Cinebase’s product is identical or substantially similar . . . to Cinebase’s Copyrighted Works.”
 12 First Am. Cmplt. ¶56 (emphasis added). Besides accusing its own product of infringement in
 13 its pleading,³ Cinebase does not plead what “product” it accuses of infringement. Similarly,
 14 Cinebase’s amended complaint alleges that Defendants “have infringed and will continue to
 15 infringe Cinebase’s copyrights . . . by using Cinebase’s Copyrighted Works to produce,
 16 distribute and/or publish digital media management products.” Id. ¶57 (emphasis added).
 17 Although it accuses a plurality of “products” of infringement, Cinebase’s first amended
 18 complaint does not identify a single product that existed when Cinebase filed its complaint in
 19 March 1998. Clearly this vague reference to undefined “products” does not meet the

23 ² In an effort to salvage its copyright claim, Cinebase falsely asserts in its opposition
 24 memorandum that the phrase “Copyrighted Works” in its first amended complaint is “defined in
 25 Paragraph 52 as the software programs for which Cinebase has registered copyrights.” See Opp.
 26 Mem. at 8:21-23. Cinebase’s characterization of its first amended complaint is squarely at odds
 27 with the language of the pleading.

28 ³ Effectively admitting that its first amended complaint is deficient under Rule 8, Cinebase
 purports to amend its complaint for a second time by filing a “Notice of Errata” which changes
 the allegations of paragraphs 56 and 70 of its first amended complaint. Defendants are not aware
 of any authority which allows a plaintiff to amend a first amended complaint by filing a “Notice
 of Errata” and Cinebase cites none.

1 requirement of specifying the allegedly infringing acts under Rule 8. Gee, 471 F. Supp. at 643.⁴

2 Fatally for Cinebase, it cannot possibly amend its complaint to identify any
3 product by which Defendants have actually infringed Cinebase's alleged copyrights. This fact
4 is undeniable, because – as Cinebase's own witnesses have admitted – Defendants presently
5 have no product at all. See Lumish Decl. Exh. A (Abrams Depo.) at 105:22-24; Exh. B (Brown
6 Depo.) at 54:14-24; Exh. C (Timko Depo.) at 62:10-15. For this reason, Cinebase's copyright
7 infringement cause of action should be dismissed with prejudice.

8 Should Defendants ever release a product, Cinebase can assess at that time
9 whether Defendants' product actually contains anything that might constitute an infringement of
10 Cinebase's copyrights. Until Defendants actually have a product, Cinebase's reckless claim of
11 copyright infringement cannot stand. Indeed, Cinebase's admissions that Defendants presently
12 have no product strongly evidences that Cinebase and its attorneys could not have performed an
13 "inquiry reasonable under the circumstances" into the bases for its copyright infringement claim
14 as required by Rule 11 of the Federal Rules of Civil Procedure.

15 3. **Form 17 Of The Federal Rules Supports A Dismissal Of Cinebase's** 16 **Copyright Infringement Claim**

17 Strikingly, the authority upon which Cinebase relies in its opposition proves that
18 Cinebase's copyright claim should be dismissed. Cinebase contends that Form 17 of the
19 Federal Rules of Civil Procedure should guide the Court in evaluating the adequacy of
20 Cinebase's copyright claim and that Cinebase's first amended copyright claim "track[s] the
21 allegations of the model complaint." See Opp. Mem. at 9:7-12. Ironically, Form 17
22 demonstrates that Cinebase's first amended complaint is deficient in significant respects under
23 Rule 8. For example, in identifying the allegedly infringing product, the Form 17 complaint

24 ⁴ Cinebase also cites QTL Corp. v. Kaplan, 46 U.S.P.Q.2d 1794 (N.D. Cal. 1998), to support its
25 contention that it need not plead the identity of the product accused of copyright infringement.
26 Contrary to Cinebase's representation, QTL does not hold that the copyrighted product and the
27 infringing product need not be identified in the complaint. Instead, the Court in QTL found that
28 plaintiff met its burden of pleading the allegedly infringed works as plaintiff's "catalogs," and
the allegedly infringing product as defendants' "product catalog." Id. at 1797. Here, unlike the
identification of a "catalog" in QTL, Cinebase provides no detail as to the allegedly infringing
"products." Because Defendants have no product at all, no product can be sufficiently identified
to satisfy Rule 8, and Cinebase's claim should be dismissed with prejudice.

1 states in part:

2 After March 10, 1936, defendant infringed said copyright
3 by publishing and placing upon the market a book entitled
4 _____, which⁵ was copied largely from plaintiff's book
5 entitled _____.

6 See Fed. R. Civ. P. Appendix of Forms, Form 17.

7 This passage from Form 17 makes clear that, to allege copyright infringement,
8 Cinebase must identify in its pleading the purportedly copyrighted work and the product that
9 allegedly infringes its copyright. Indeed, Form 17 provides that the specific copyrighted works
10 and infringing product should be identified by name. Another passage of Form 17 -- which
11 Cinebase conceals in its opposition -- establishes that, to plead copyright infringement,
12 Cinebase should have attached to its first amended complaint a copy of its allegedly copyrighted
13 works and a copy of Defendants' allegedly infringing product.

14 Despite its awareness of Form 17, Cinebase did not identify or attach a copy of
15 its allegedly copyrighted "software architecture" or "related design documents and object
16 codes." See First Am. Cmplt. ¶52. Of course, Cinebase does not -- and could not -- identify or
17 attach a copy of any allegedly infringing product because, as Cinebase has admitted, Defendants
18 have no product at all.

19 **B. Cinebase's Reverse Passing Off Claim Should Be Dismissed**

20 To support its claim for reverse passing off, Cinebase's opposition relies solely
21 on the allegation in Cinebase's first amended complaint that Defendants "intend to market"
22 Cinebase's product as their own. See Opp. Mem. at 11:1-4 (emphasis added); First Am. Cmplt.
23 ¶63. Cinebase does not (and cannot) contend that Defendants have ever actually marketed a
24 Cinebase product as their own. Id. This allegation about what Defendants might do in the
25 future does not satisfy Rule 8.

26 The Ninth Circuit has clearly identified the elements for "reverse passing off"
27 under the Lanham Act:

28 ⁵ Apparently ignoring the language of Form 17, Cinebase argues that the Form 17 complaint
does not contain facts that describe by what acts the defendant infringed the copyright. See Opp.
Mem. at 9 n.5. The Form 17 complaint expressly names the title of the allegedly infringing
work and the title of the copyrighted work.

Express reverse passing off occurs when one party . . . obtains a second party's goods, removes the second party's name, and then markets the product under its own name. . . A defendant may also be guilty of reverse palming off by selling or offering for sale another's product that has been modified slightly and then labeled with a different name.

Summit Mach. Tool Mfg. v. Victor CNC Systems, 7 F.3d 1434, 1437 (9th Cir. 1993) (citations omitted); see also Smith v. Montoro, 648 F.2d 602, 605 (9th Cir. 1981). As the Summit case makes clear, to state a claim for reversing passing off, a complaint must allege that a defendant actually marketed, sold, or offered for sale as its own the plaintiff's product before a cause of action may lie.

In the face of this clear authority, Cinebase's first amended complaint and its opposition brief fail to identify any Cinebase product that Defendants are allegedly passing off. Indeed, despite Defendants' identification of this deficiency in their Motion, Cinebase still refuses to identify a specific product. See Opp. Mem. at 11. If Cinebase were presently able to plead the facts to support a claim for reverse passing off, it would have done so. Because the actual marketing, sale, or offer for sale of Cinebase's product as Defendants' own is an essential element of a claim for reverse passing off, and because Cinebase has not and cannot plead this essential element, Cinebase's claim should be dismissed with prejudice.

C. Katherine Topper Should Be Dismissed From This Lawsuit For Lack Of Subject Matter Jurisdiction

In its opposition, Cinebase acknowledges that it has not pleaded that Katherine Topper directly infringed any Cinebase copyright or directly engaged in any activities that could arguably be "reverse passing off." See Opp. Mem. at 11-12. However, Cinebase still argues that Ms. Topper should not be dismissed because she has "contributed" to the infringement of Cinebase's copyrights and has "contributed" to what Cinebase calls its "trademark claim." See Id. at 12. This contention is baseless and should be disregarded.

1. Cinebase Does Not State A Claim Against Ms. Topper For Copyright Infringement

To state a claim for contributory copyright infringement, this Court has held that

1 the complaint must allege that the defendant (1) has “knowledge of the infringing activity”, and
 2 (2) “induces, causes or materially contributes to the infringing conduct of another.” Religious
 3 Technology Center v. Netcom On-Line Comm. Svcs, Inc., 907 F. Supp. 1361, 1373 (N.D. Cal.
 4 1995) (quoting Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d.
 5 1159, 1162 (2d Cir. 1971)). Cinebase’s first amended complaint contains no such allegations.
 6 In its opposition, Cinebase does not even argue that it has pleaded such knowledge, inducement,
 7 causation, or material contribution.

8 Instead, Cinebase argues that, based upon the allegations in ¶57 of its first
 9 amended complaint, Cinebase has alleged sufficient facts “to impute to Topper knowledge of
 10 and contribution to Defendants’ copyright infringement activities.” Opp. Mem. at 12 (emphasis
 11 added). The allegations of ¶57, however, are plainly insufficient to allege contributory
 12 infringement on the part of Ms. Topper. In discussing ¶57, Cinebase fails to advise the Court
 13 that it expressly refers back to previous allegations in the first amended complaint to support the
 14 infringement allegations. Indeed, ¶57 begins by stating that “By means of the actions
 15 complained of herein, Defendants have infringed and will continue to infringe Cinebase’s
 16 copyrights in the Copyrighted Works by using Cinebase’s Copyrighted Works to produce,
 17 distribute and/or publish” products. None of the paragraphs in the first amended complaint that
 18 precedes ¶57 ever alleges that Ms. Topper used, or helped others to use, Cinebase’s copyrighted
 19 computer software. Rather, in paragraphs 47 and 48 of the first amended complaint, Cinebase
 20 alleges that each defendant other than Ms. Topper has marketed, published, distributed, and
 21 made unspecified products.

22 Moreover, considering that Ms. Topper works at Media Guaranty in the
 23 marketing department, and has no participation in the development or design of Media
 24 Guaranty’s planned software, it is beyond reason to impute to her any inducement, causation, or
 25 material contribution to the infringement of any alleged Cinebase copyrights in computer
 26 software. As discussed above, these copyrights cover, at best, Cinebase’s program source code
 27 and header source code. Cinebase does not allege that Ms. Topper has any knowledge of the
 28 subject matter of these copyrights, or that Ms. Topper has any involvement at all with Media

1 Guaranty's source code. There is simply no basis for imputing to Ms. Topper any contribution
2 to source code about which she has no material knowledge or participation.

3 **2. Cinebase Does Not State A Claim Against Ms. Topper For Reverse**
4 **Passing Off**

5 Because Cinebase has not properly pleaded that Ms. Topper has actually engaged
6 in activities that could conceivably amount to reverse passing off, Cinebase asks the Court to
7 convert its claim against Ms. Topper to one of "contributory" reverse passing off. The only
8 allegation which Cinebase cites in support of this "claim" is the allegation in ¶63 of the first
9 amended complaint that Ms. Topper allegedly "intends" at some point to market software. See
10 Opp. Mem. at 12:13-18.

11 In relying on this allegation, Cinebase effectively asks the Court to recognize a
12 claim of *intended* contributory reverse passing off. To support this novel theory, Cinebase
13 couches its reverse passing off cause of action as "the trademark claim" and cites authorities
14 that a defendant may be liable for contributory trademark infringement. See Opp. at 12.
15 Cinebase cites no authority which holds that contributory reverse passing off is a cognizable
16 theory under any federal law.

17 Even assuming *arguendo* that a defendant could be held liable for contributing to
18 reverse passing off, Cinebase has pleaded no such cause of action in its amended complaint and
19 has not pleaded any facts to support such a claim. Specifically, Cinebase does not plead any
20 knowledge, inducement, causation, or material contribution by Ms. Topper to the actual
21 marketing, sale, or offer for sale of any Cinebase product. Because, as discussed above,
22 Defendants have no product at all, there cannot have been any reverse passing off to which Ms.
23 Topper could have contributed.

24 Because Cinebase cannot properly state a claim against Ms. Topper for either
25 copyright infringement or reverse passing off, the Court should dismiss with prejudice these
26 causes of action against Ms. Topper.

27 **D. Cinebase's Breach Of Confidence Cause Of Action Should Be Dismissed**

28 In their Motion, Defendants established three bases for dismissing Cinebase's

1 cause of action for breach of confidence. These bases included (1) that Cinebase pleaded that
 2 the purported ideas were not novel, (2) that Cinebase effectively pleaded that the purported
 3 ideas were not confidential, and (3) that the purported ideas were not sufficiently identified to
 4 provide adequate notice to Defendants.

5 In its opposition, Cinebase acknowledges the inadequacy of its claim in pleading
 6 the absence of novelty and confidentiality, and purports to amend this claim a second time by
 7 filing a Notice of Errata. As changed by the Notice of Errata, ¶70 of the first amended
 8 complaint now alleges that, "To the extent that any part of Cinebase's "Intellectual Property" is
 9 "novel and unique and are not within the subject matter of copyright," Defendants have
 10 breached the confidence of each such "part."⁶ See Notice of Errata at 2. In the first amended
 11 complaint, "Intellectual Property" is defined in equally expansive and vague terms as "computer
 12 software, software architecture, technology and know-how, trade secrets, novel ideas, and other
 13 confidential and proprietary information [Cinebase] has developed." First Am. Cmplt. 21.

14 These ambiguous definitions provide absolutely no guidance to Defendants
 15 concerning the actual ideas they are alleged to have misappropriated. The first amended
 16 complaint does not identify any particular "ideas" or "parts" of ideas. Nor does the first
 17 amended complaint identify which "ideas" or parts of ideas are confidential. These failures are
 18 fatal, particularly in light of the admission in Cinebase's first amended complaint that Cinebase
 19 filed on a public basis software that contains at least some of the "ideas" with the United States
 20 Copyright Office. As a result of Cinebase's pleading deficiencies, Defendants cannot assess the
 21 claim or prepare an appropriate answer, because they cannot determine the "ideas" that are in
 22 dispute. For these reasons, this cause of action should be dismissed. See Grid Sys. Corp. v.
 23 Texas Instruments Inc., 771 F. Supp. 1033, 1037 (N.D. Cal. 1991) (a complaint "should provide
 24 the defendant with a basis for assessing the initial strength of the plaintiff's claim, for
 25 preserving relevant evidence, for identifying any related counter- or cross-claims, and for

26 ⁶ In footnote 7 of its opposition, Cinebase asserts that the allegedly misappropriated ideas are
 27 within the subject matter of copyright. Opp. Mem. at 13 n.7. This is at odds with the Notice of
 28 Errata, which states that the allegedly misappropriated ideas are "not within the subject matter of
 copyright." It is assumed for the purposes of this Reply that the Notice Of Errata is correct, and
 that footnote 7 merely contains another Cinebase "typographical error."

1 preparing an appropriate answer.”).

2
3 **E. Cinebase’s Breach Of Implied Contract Claim Should Be Dismissed**

4 In its opposition, Cinebase ignores Ninth Circuit precedent which makes clear
5 that Cinebase cannot state a cognizable claim against Defendants for breach of implied contract.
6 To state such a claim, Cinebase was required to plead under California law “that he or she
7 prepared the work; that he or she disclosed the work to the offeree for sale; . . . the offeree
8 voluntarily accepted the disclosure knowing the conditions on which it was tendered . . .; and
9 the reasonable value of the work.” Aliotti v. Dakin & Co., 831 F.2d 898, 902 (9th Cir. 1987)
10 (emphasis added) (applying California law on implied in fact contracts). Because Cinebase
11 pleads that each of the individual Defendants was an employee of Cinebase, it cannot plead that
12 Cinebase offered works to the Defendants “for sale.”

13 Ignoring this issue, Cinebase takes a different tack and argues that it does not
14 have to plead the identity of the contracts it allegedly has with each defendant, or the terms of
15 those alleged contracts. See Opp. Mem. at 14. Remarkably, the only authority Cinebase cites
16 concerning this issue of California law is a series of cases from other jurisdictions. In addition
17 to having no bearing on California law, these cases do not even support Cinebase’s position.
18 For example, to support its conclusion that each Defendant is not entitled to know what
19 individual contract he or she is alleged to have with Cinebase, Cinebase cites to Zeigan v. Blue
20 Cross & Blue Shield of Greater N.Y., 607 F. Supp. 1434, 1436-37 (S.D.N.Y. 1985). This case
21 is inapposite. The relevant holding in Zeigan relates only to whether a plaintiff must allege that
22 it has suffered an injury in order to properly plead the breach of a written contract under New
23 York law. Id. The case has no bearing on whether Cinebase can properly neglect to identify
24 any single implied in fact contract with any single defendant in this action.

25 Here again, Cinebase does not plead the crucial elements of this cause of action
26 because it cannot. There are no contracts between Cinebase and any defendant wherein
27 Cinebase disclosed work for sale or wherein any Defendant accepted the disclosure knowing
28 there were any contractual conditions attached. This cause of action should be dismissed with

1 prejudice.

2 **F. Cinebase's Trade Secret Misappropriation Claim Should Be Dismissed**

3 In its opposition, Cinebase erroneously states that Defendants have not cited any
4 authority which establishes that, in a trade secret misappropriation claim, plaintiff must identify
5 its trade secrets with specificity. See Opp. Mem. at 15. This is incorrect. In its Motion,
6 Defendants cite to the leading case on point in California jurisprudence: Diodes, Inc. v.
7 Franzen, 260 Cal. App. 2d 244 (1968). Diodes is clear in its holding that "the complainant
8 should describe the subject matter of the trade secret with sufficient particularity to separate it
9 from matters of general knowledge in the trade or of special knowledge of those persons . .
10 .skilled in the trade." Id. at 253.⁷

11 As discussed in Defendants' Motion, Cinebase's purported "trade secrets"
12 amount to little more than vague descriptions of broad categories of information which shed no
13 light on what particular information is secret and what information is generally known. This
14 deficiency is particularly important in this case where more than 100 pages of Cinebase's
15 unredacted source code is now publicly available at the U.S. Copyright Office where it was
16 deposited with Cinebase's application for a copyright registration. See Lumish Decl. Exhs. D
17 and E. When, as here, a plaintiff pleads facts which show that it has made a massive disclosure
18 of an alleged secret – software code – to the public, it is incumbent upon the plaintiff to identify
19 any remaining information which it considers to be secret sufficiently to distinguish the
20 information from public domain information. Otherwise, Defendants are left to guess about that
21 which is public and that which is secret.

22 **G. Cinebase's Intentional Interference Claim Should Be Dismissed With**
23 **Prejudice**

24 Defendants' Motion clearly establishes that Cinebase has failed to plead all of
25 the elements of intentional interference with prospective economic advantage. Specifically,
26

27 ⁷ Distinguishing that which is public domain from that which is confidential does not require
28 Cinebase to disclose its purported trade secrets, as it contends. See Opp. Mem. at 15. For
example, a plaintiff can identify the software algorithms or routines that are allegedly secret
without disclosing the logic or symbols or words used to create the algorithms or routines.

neither Cinebase's first amended complaint nor its opposition ever alleges that Defendants' have caused an actual disruption to any relationship Cinebase has with its customers. Instead, Cinebase argues only that "defendants knowingly and intentionally interfered" with Cinebase's customers and strategic partners including Hambricht & Quist. Opp. Mem. at 18.

It is not enough for Cinebase to allege that Defendants have acted to interfere with a Cinebase relationship. Cinebase must also allege that an actual disruption has occurred. Conkle v. Jeong, 73 F.3d 909, 928 (9th Cir. 1995) (citing Blank v. Kirwan, 39 Cal.3d 311, 330 (1985)). In its opposition Cinebase conflates these two independent elements and fails to show that it has pleaded an actual disruption of its relationship with Hambricht & Quist or with anyone else. Because Cinebase still cannot identify a single relationship that has actually been disrupted by any defendant, its interference cause of action should be dismissed with prejudice.

H. Cinebase Does Not Properly Plead Fraud

Cinebase's amended complaint fails to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). Specifically, as detailed in Defendants' Motion, the amended complaint fails to identify "the time, place, and nature" of the alleged misrepresentation Dr. Brown made concerning his intentions to enter into an employment agreement with Cinebase.

In its opposition, Cinebase's first argument is to repeat its conclusion that "Dr. Brown also falsely represented over the course of the months between March and October 1997 that he would enter into an employment agreement with Cinebase." Opp. Mem. at 17. Even in its opposition, Cinebase cannot identify any particular statement made by Dr. Brown, and can only identify the alleged timing of this claimed misrepresentation over the span of 7 months. Moreover, Cinebase still cannot identify the place at which these alleged misrepresentations were made or the persons to whom they were made.

In a desperate effort to save its faulty fraud claim, Cinebase brazenly attempts to expand its claim of fraudulent misrepresentation to include a new claim of fraudulent concealment pursuant to Cal. Civ. Code § 1710.3. This belated attempt to add an entirely new fraud theory is precisely the mischief that Rule 9(b) was intended to prevent, and precisely the reason Cinebase's amended complaint fails to plead fraud with particularity. Cinebase's

1 allegations concerning Dr. Brown's purported representations regarding entering into an
2 employment agreement should be stricken.

3 **III. THE COURT SHOULD DECLINE SUPPLEMENTAL JURISDICTION AND**
4 **DISMISS MS. TOPPER AND THIS ACTION IN ITS ENTIRETY**

5 As set forth in Defendants' Motion, Cinebase's nine state law claims
6 predominate its federal claims and raise novel and complex issues of California law and, thus,
7 should be tried in State court after the Court dismisses Cinebase's federal claims. This is
8 especially true in light of the strong preference the United States Supreme Court has articulated
9 for dismissing state law claims if no federal claims can be sustained. See Carnegie Mellon
10 Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988) (stating that declining to exercise supplemental
11 jurisdiction over state law claims is "the usual case [where] all federal law claims are eliminated
12 before trial[.]"); United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) ("Certainly if the
13 federal claims are dismissed before trial . . . the state claims should be dismissed as well.").

14 Despite all evidence to the contrary, Cinebase argues that its state law claims do
15 not predominate the federal claims and that there are no novel issues of California law. These
16 arguments bear no weight. First, Cinebase's assertion of the "inevitable use" theory in this case
17 plainly advocates a theory of law that California has never accepted. In its opposition, even
18 Cinebase admits that "California courts apparently have not had occasion to deal with inevitable
19 use[.]" Opp. Mem. at 20. The best Cinebase can do is claim that other jurisdictions have
20 applied the inevitable use theory, and thus the issue is neither novel nor complex. Id. at 20.
21 This argument makes no sense. The question of whether California state courts should apply the
22 inevitable use theory is certainly a novel and complex issue that is best left to those courts.
23 Indeed, the question is one that should be certified to the California Supreme Court. See Cal.
24 Rules of Court, Div. I, R. 29.5 (1997) (Questions of state law may be certified to the Supreme
25 Court where, *inter alia*, "the decisions of California appellate courts provide no controlling
26 precedent concerning the certified question.").

27 Second, Cinebase's perfunctory argument against the obvious predomination of
28 the federal claims by the state law claims should be disregarded. It is clear from Cinebase's

1 amended complaint and from its actions that the state law claims far outweigh the federal claims
 2 in this action. As discussed above, the scope of Cinebase's copyright registrations limits its
 3 copyright infringement claim to the source code of its 2.0 software. Similarly, Cinebase's
 4 reverse passing off claim must be limited to one of Cinebase's three products.⁸ Conversely,
 5 Cinebase's trade secret, breach of confidence, unfair competition, breach of fiduciary duty,
 6 fraud, trade disparagement, and intentional interference claims purportedly relate to issues far
 7 beyond Cinebase's software. Cinebase contends that these causes of action reach substantially
 8 broader issues related to, *inter alia*, Cinebase's marketing, employees, "know how," customers,
 9 strategic partners, and reputation. Moreover, the fact that Cinebase only sought a preliminary
 10 injunction based on its state law trade secret claim speaks volumes over attorney argument now
 11 presented in response to Defendants' Motion.

12 Assuming the Court dismisses Cinebase's federal claims against Ms. Topper, the
 13 Court should decline to exercise supplemental jurisdiction and should dismiss Ms. Topper from
 14 this case. Similarly, assuming the Court dismisses the federal claims against all of the
 15 Defendants, the Court should dismiss this action in its entirety and allow Cinebase to assert any
 16 claims that are not dismissed in California Superior Court.⁹

17 **IV. CONCLUSION**

18 For all of the above reasons, Defendants respectfully request that the Court grant
 19 Defendants' Motion To Dismiss Cinebase's First And Second Causes Of Action In Its First
 20 Amended Complaint, To Dismiss The First Amended Complaint, To Dismiss Defendant
 21 Katherine Topper From This Lawsuit, To Dismiss Cinebase's Third, Fourth, Fifth, And
 22 Eleventh Causes Of Action, And To Strike Portions Of Cinebase's Ninth Cause Of Action.

23
 24
 25 ⁸ Cinebase has developed at least a product entitled "Cinebase 1.X" (which was sold as several
 26 different versions), and has started development on a planned product entitled "Cinebase 2.X"
 additionally, Cinebase has sold custom software to at least one customer.

27 ⁹ Despite Cinebase's contention, Defendants in no way seek to have two cases heard in two
 28 separate courts. To the contrary, Defendants seek to have any of Cinebase's surviving claims
 heard in State court where they belong.

1
2 DATED: August 17, 1998

JARED BOBROW
DOUGLAS E. LUMISH
WEIL, GOTSHAL & MANGES LLP

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4
5
6 By:


Jared Bobrow

Attorneys for Defendants Media Guaranty
Trust, Inc., Allen L. Brown, Jr., Ph.D.,
Natalia X. Krol, Joseph Rozenfeld, Thomas
Wills, Carl Reisinger, and Katherine Topper

CERTIFICATE OF SERVICE

I, Jeanne Amour-Rice, declare:

I am over the age of 18 years, am not a party to this Action, and am employed in the County of San Mateo. My place of employment and business address is Weil, Gotshal & Manges LLP, 2882 Sand Hill Road, Suite 280, Menlo Park, California 94025.

On August 17, 1998, I caused to be served the attached DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT on the following individuals and entities, as addressed below, by the means indicated below:

___ **BY MAIL.** I caused the above-identified documents(s) to be deposited for collection at Weil, Gotshal & Manges LLP following the regular practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service on this day.

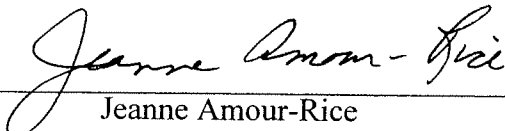
___ **BY HAND DELIVERY.** I caused the above-identified document(s) to be delivered by hand to the party(ies) listed below at the address(es) shown.

☒ **BY FEDERAL EXPRESS.** I caused the above-identified document(s) to be placed in a sealed Federal Express envelope(s) with delivery fees fully prepaid, for delivery to addressee(s), as indicated below on the next business day.

___ **BY FACSIMILE.** I caused the above-identified document(s) to be sent by facsimile transmission to the party(ies) listed below at the facsimile number(s) shown.

KEVIN LEICHTER, ESQ.
Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro LLP
2121 Avenue of the Stars, 18th Floor
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed in Menlo Park, California on August 17, 1998.


Jeanne Amour-Rice